Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

T. DOE, INDIVIDUALLY AND IN HER CAPACITY AS ONE OF THE WRONGFUL DEATH BENEFICIARIES OF D. DOE,

Petitioners,

v.

MISSISSIPPI BLOOD SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Mississippi

PETITION FOR WRIT OF CERTIORARI

T. ROE FRAZER II*
LANGSTON FRAZER SWEET
& FREESE, P.A.
201 North President Street
Jackson, MS 39201
(601) 969-1356
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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32 pp

QUESTIONS PRESENTED

Whether the judgment of the Supreme Court of the State of Mississippi unconstitutionally applied a Mississippi Rule of Civil Procedure to an action pending in a federal court?

Whether the judgment of the Supreme Court of the State of Mississippi unconstitutionally applied Mississippi common law to joinder in federal court?

Whether the judgment of the Supreme Court of the State of Mississippi violates the Supremacy Clause of the United States?

Whether the judgment of the Mississippi Supreme Court violates the rulemaking authority of the Supreme Court of the United States?

Whether the judgment of the Supreme Court of the State of Mississippi violated Petitioners' Fourteenth Amendment rights?

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PETITION FOR WRIT OF CERTIORARI

T. Doe respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Mississippi in this case.

OPINIONS BELOW

This judgment and order of the Supreme Court of the State of Mississippi are reported at *T. Doe, et al. v. Mississippi Blood Svcs., Inc.*, No. 94-CA-10262-SCT, 1997 Miss. LEXIS 460, October 2, 1997, *rehearing denied*, December 18, 1997.

JURISDICTION

The final judgment of the Supreme Court of the State of Mississippi was entered on October 2, 1997. 1a. The order of the Supreme Court of the State of Mississippi denying the petition for rehearing was entered on December 18, 1997. 11a. The Supreme Court of the State of Mississippi is the highest court in the State of Mississippi. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441(a)

28 U.S.C. § 1447(a)

28 U.S.C. § 2071

28 U.S.C. § 2072

28 U.S.C. § 1332(a)

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U.S. Constitution, Art. VI

U.S. Constitution, Amend. XIV

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from a state trial court and state supreme court's unconstitutional rules and misapplication of state rules and laws of procedure to a case pending in federal court on removal.

Petitioner, T. Doe, individually and in her capacity as one of the wrongful death beneficiaries of D. Doe (hereinafter "Petitioners"), filed a Complaint in the Circuit Court of Hinds County, Mississippi on December 30, 1993, against United Blood Services of Mississippi, American Association of Blood Banks, and John Does 1-50. The John Doe 1-50 fictitious defendants were named under Rule 9(h) of the Mississippi Rules of Civil Procedure

("M.R.C.P."). There is no such fictitious parties rule in the Federal Rules of Civil Procedure. Petitioners alleged that the Defendants supplied HIV contaminated blood to Forrest General Hospital, and as a result of a blood transfusion containing such blood, the decedent (D. Doe) acquired AIDS and died.

On February 2, 1994, United Blood Services, pursuant to 28 U.S.C. §§ 1332(a) and 1441(a), filed a Notice of Removal to the United States District Court for the Southern District of Mississippi. American Association of Blood Banks joined in the removal and both Defendants filed motions to dismiss. The United States District Court for the Southern District of Mississippi dismissed United Blood Services on July 11, 1994, and by order granted Petitioners leave to join the Respondent herein, Mississippi Blood Services, Inc. (hereinafter "Respondent") (13a), which Petitioners did by filing an amended complaint. The U.S. District Court dismissed American Association of Blood Banks on July 29, 1994, and due to the lack of complete diversity, remanded the case to the Circuit Court of Hinds County, Mississippi.

After remand, Respondent filed a Motion to Dismiss or, Alternatively, for Summary Judgment alleging that Petitioners had not, under the Mississippi Rules of Civil Procedure and applicable Mississippi common law, timely and properly joined Respondent, and that the claims against Respondent were barred by the applicable statute of limitations. On December 2, 1994, the Circuit Court of Hinds County granted summary judgment. 15a.

Petitioners appealed the summary judgment ruling to the Supreme Court of Mississippi and, on October 2, 1997, the Supreme Court of the State of Mississippi affirmed the Circuit Court of Hinds County's summary judgment ruling. Petitioners petitioned the Supreme Court of the State of Mississippi for rehearing. Said petition for rehearing was denied on December 18, 1997. This petition ensued.

REASONS FOR GRANTING THE PETITION

A. THE SUPREME COURT OF THE STATE OF MISSISSIPPI UNCONSTITUTIONALLY APPLIED A MISSISSIPPI RULE OF CIVIL PROCEDURE TO AN ACTION PENDING IN A FEDERAL COURT.

The Mississippi Supreme Court based its judgment on Petitioners' alleged failure to follow the theretofore unstated substitution procedure in Rule 9(h) of the Mississippi Rules of Civil Procedure. This ruling by the Mississippi Supreme Court cannot stand as a matter of constitutional and federal statutory law due to the fact that Respondent was joined as a party defendant pursuant to **federal court order** while the case was pending in **federal court.** There is no fictitious pleading rule in the Federal Rules of Civil Procedure. The equivalent of M.R.C.P. 9(h) simply does not exist in the Federal Rules of Civil Procedure. Therefore, it was contrary to federal procedure, federal statutory law, and Constitutional law for the federal court and the Petitioners to employ Rule 9(h) of the Mississippi Rules of Civil Procedure to have

joined Respondent as a defendant. The substitution procedure set forth in the Mississippi Supreme Court's Judgment and Opinion at pages 3-5 was a legal impossibility. The Federal Rules of Civil Procedure exclusively apply to all cases in the federal system, rather than the Mississippi Rules of Civil Procedure. The Mississippi Supreme Court's judgment conflicts with the following federal statutory laws, rules of procedure, and U.S. Constitutional provisions: Rules 1 and 15 of the Federal Rules of Civil Procedure; U.S. Constitution, Art. III, sect. 1; U.S. Constitution, Art. III, sect. 2; U.S. Constitution, Art. VI; and U.S. Constitution, Amend. XIV.

B. THE SUPREME COURT OF THE STATE OF MISSISSIPPI UNCONSTITUTIONALLY APPLIED MISSISSIPPI COMMON LAW TO JOINDER IN FEDERAL COURT.

The Supreme Court of Mississippi also held that Petitioners failed to act with "reasonable diligence" under the Mississippi common law procedural precedent of *Womble v. Singing River Hosp.*, 618 So. 2d 1252 (Miss. 1993). This ruling is Constitutionally flawed because *Womble's* holding cannot apply to a case pending in federal court. The *Womble* decision is a case interpreting the rules of procedure in Mississippi state courts, and should not and cannot as a matter of federal law be applied to this case while it was pending in federal court.

This ruling by the Mississippi Supreme Court cannot stand as a matter of constitutional and federal statutory law due to the fact that Respondent was joined as a party defendant by **federal court order** while the case was

pending in **federal court**. There is no fictitious pleading rule in the Federal Rules of Civil Procedure. There thus can be no "reasonable diligence" requirement in federal court to join a fictitious party, and *Womble* is irrelevant to any case pending in federal court. Therefore, it is impossible and contrary to law for the federal court and the Petitioners to apply or abide by *Womble* in regards to the joinder of Respondent. The substitution procedure set forth in the Mississippi Supreme Court's Judgment and Opinion at pages 3-5 was a legal impossibility. The Federal Rules of Civil Procedure apply to all cases in the federal system, rather than state common law interpreting the Mississippi Rules of Civil Procedure. The Mississippi Supreme Court's judgment conflicts with the following federal statutory laws, rules of procedure, and U.S. Constitutional provisions: Rules 1 and 15 of the Federal Rules of Civil Procedure; U.S. Constitution, Art. III, sect. 1; U.S. Constitution, Art. III, sect. 2; U.S. Constitution, Art. VI; and U.S. Constitution, Amend. XIV.

C. THE SUPREME COURT OF THE STATE OF MISSISSIPPI VIOLATED PETITIONERS' RIGHTS OF DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAWS.

The Supreme Court of the State of Mississippi's rulings as set forth in A. and B. hereinabove effectively deprived Petitioners of their rights secured by the Fourteenth Amendment to the Constitution of the United States, namely their rights to due process of law and

equal protection under the laws. By terminating Petitioners' causes of action because of their failure to properly join Respondent under Rule 9(h) of the Mississippi Rules of Civil Procedure and/or their failure to act with "reasonable diligence" as set forth in *Womble*, despite the case being in federal court and in the face of the order of the U.S. District Court, is a flagrant violation of Petitioners' Fourteenth Amendment rights. The Mississippi Supreme Court's judgment conflicts with the following federal statutory laws, rules of procedure, and U.S. Constitutional provisions: Rules 1 and 15 of the Federal Rules of Civil Procedure; U.S. Constitution, Art. III, sect. 1; U.S. Constitution, Art. III, sect. 2; U.S. Constitution, Art. VI; and U.S. Constitution, Amend. XIV.

CONCLUSION

For all of the reasons cited in this Petition, the Petitioners properly proceeded within the Federal Rules of Civil Procedure and pursuant to the federal court's order allowing amendment and joinder of Respondent, given the fact of the removal of the case to U.S. District Court and its pendency there for six (6) months and with all the restrictions on discovery in federal court due to the Uniform Local Rules and the Uniform Plan for the United States District Court for the Southern District of Mississippi and the absence of a fictitious pleading rule in the Federal Rules of Civil Procedure. The Mississippi Supreme Court's judgment flatly violates the Supremacy Clause of Article VI of the U.S. Constitution, the Article

III power of the federal courts under the U.S. Constitution, Rules 1 and 15 of the Federal Rules of Civil Procedure, and the statutory mandates of 28 U.S.C. §§ 1441(a), 1447(a), 2071, 2072, and 1332(a). Moreover, the Mississippi Supreme Court's judgment has deprived Petitioners of their rights secured under the Fourteenth Amendment to the U.S. Constitution.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

T. Roe Frazer II*
Langston Frazer Sweet
& Freese, P.A.
201 North President Street
Jackson, MS 39201
(601) 969-1356

Attorneys for Petitioners T. Doe, Individually and in her Capacity as one of the Wrongful Death Beneficiaries of D. Doe

**Counsel of Record*

Dated: March 18, 1998.

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. 94-CA-01262-SCT

T. DOE, INDIVIDUALLY, AND IN HER CAPACITY AS ONE OF THE WRONGFUL DEATH BENEFICIARIES OF D. DOE

v.

MISSISSIPPI BLOOD SERVICES, INC.

DATE OF JUDGMENT:	12/02/94
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	T. ROE FRAZER II
ATTORNEY FOR APPELLEE:	JOHN P. SNEED
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
DISPOSITION:	AFFIRMED - 10/2/97
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE PRATHER, P.J., ROBERTS AND MILLS, JJ. MILLS, JUSTICE, FOR THE COURT:

¶1. This appeal deals solely with the application of Rules 9(h) and 15(c)(2) of the Mississippi Rules of Civil Procedure. From an Order of the Hinds County Circuit Court granting the motion to dismiss and for summary judgment filed by Mississippi Blood Services, Inc., T. Doe appeals.

I.

FACTS

¶2. In October of 1983, D. Doe received a blood transfusion while undergoing a hysterectomy at Forrest General Hospital. She was diagnosed with AIDS in September of 1987 and died as a result of the disease on January 1, 1991.

¶3. The plaintiff began efforts to determine the true parties to this action on December 27, 1993, when Ginny Y. Kennedy, a paralegal of plaintiff's counsel contacted the United Blood Services of Mississippi office at Forrest General Hospital by telephone. She was told by "a person who answered the phone" that " United Blood Services of Mississippi had been providing blood and blood products to Forrest General Hospital for 'many years.' She was not one hundred percent certain whether United Blood Services of Mississippi had provided blood to Forrest General Hospital in 1982 and 1983, but stated that United Blood Services of Mississippi probably did." The plaintiff requested hospital records for the first time on December 28, 1993. This request was cancelled on January 4, 1994.

¶4. T. Doe, the daughter of the deceased, filed a wrongful death claim on December 30, 1993, against United Blood Services of Mississippi, American Association of Blood Banks, and John Does 1-50. The parties to this action agree that the applicable statute of limitations would have run on January 1, 1994.

¶5. On February 2, 1994, United Blood Services removed the case to federal court and then sought to be dismissed from the action alleging that it did not supply the blood during the questioned time period. On July 8,

1994, T. Doe moved *ore tenus* to dismiss United and to join Mississippi Blood Services, Inc., a Mississippi corporation. On July 29, 1994, the plaintiff amended her complaint naming Mississippi Blood Services, Inc., and the federal court remanded the case to the Circuit Court of Hinds County.

¶6. Upon motion by the defendant, Mississippi Blood Services, Inc., Judge Coleman dismissed the action on December 2, 1994, finding that the "plaintiff did not have MBS listed as a substitute for a John Doe defendant" and that the plaintiff was "not reasonably diligent in obtaining the collector, etc., of the blood."

II.

LAW

A. THE PLAINTIFF FAILED TO PROPERLY SUBSTITUTE MISSISSIPPI BLOOD SERVICES, INC. FOR A FICTITIOUS PARTY.

¶7. The plaintiff failed to properly substitute Mississippi Blood Services, Inc. for a fictitious party. Mississippi Blood Services, Inc. was joined seven months after the three-year statute of limitations expired on the wrongful death cause of action. The appellant asserts that she properly substituted Mississippi Blood Services, Inc. for one of the John Doe defendants thereby enjoying the relation back provisions of Mississippi Rules of Civil Procedure 15(c) and 9(h). However, the record belies this assertion.

¶8. On July 8, 1994, the plaintiff moved for the voluntary dismissal of United Blood Services. In the same

motion, the plaintiff requested leave to amend her complaint and named Mississippi Blood Services, Inc. The amended complaint simply replaced all references to United Blood Services with Mississippi Blood Services, Inc. All fifty unnamed fictitious defendants remained.

¶9. Rule 9(h) sets forth the following requirements for naming fictitious parties:

> (h) Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

Mississippi Rules of Civil Procedure 9(h). However, if one joins a new party without meeting the requirements set forth in Miss. Rules Civ. Pro. 9(h), the new party must be served prior to the running of the statute of limitations. In this case, the plaintiff merely substituted Mississippi Blood Services, Inc. for a named party, United Blood Services. The complaint filed against Mississippi Blood Services, Inc. was identical to the one filed against United Blood Services with only the names switched. In the amended complaint, the plaintiff continued to name all John Does found in the original complaint.

¶10. In ***Schultz v. Romanace,*** 906 S.W.2d 393, 395 (Mo. Ct. App. 1995), when faced with an analogous situation, the Missouri Court of Appeals refused to allow the joinder of two new parties after the running of the statute of limitations. On appeal, the plaintiff asserted that the new parties were substitutions for named John Does;

however, the plaintiff added the new names "without deleting any fictitious name that was included in the original petition." Missouri found this was merely an attempt to join new parties after the expiration of the statute of limitations. ***Schultz,*** 906 S.W.2d at 395-96. In the case *sub judice,* the plaintiff is also attempting to characterize the joinder of a new party after the running of the statute of limitations–as a substitution for a fictitious party. However, as in ***Schultz,*** all 50 originally named John Does remain. We find that the plaintiff improperly substituted Mississippi Blood Services, Inc. for United Blood Services, not for a fictitiously named defendant.

B. THE PLAINTIFF FAILED TO EXERCISE REASONABLE DILIGENCE TO ASCERTAIN THE TRUE PARTIES TO THE CAUSE OF ACTION PRIOR TO THE RUNNING OF THE STATUTE OF LIMITATIONS.

¶11. In addition to the plaintiff's failure to properly substitute parties, the claim was further properly dismissed due to the plaintiff's failure to timely determine proper parties. This Court, in ***Womble v. Singing River Hosp.,*** 618 So. 2d 1252, 1266-68 (Miss. 1993), fashioned a "reasonable diligence" test to determine the proper substitution of unknown parties. On March 28, 1988, nine (9) days before the running of the applicable statute of limitations, ***Womble*** filed a medical malpractice claim naming Singing River Hospital, the hospital's board of trustees, and Singing River Hospital's emergency room physicians and nurses (John Does 1-5) as defendants. Upon discovering the names of the emergency room physicians, the plaintiff substituted the doctors for the John

Doe defendants. This Court refused to apply Rule 9(h) stating that:

> there were numerous medical records on file at SRH indicating the extent to which Doctors Weatherall, Longmire, and Calhoun had participated in the treatment of Helen Womble. *A reasonably diligent inquiry by the appellants into the history of the deceased's medical treatment would have revealed to appellants the identities of the persons they sought to identify categorically* as "Emergency Room Physicians and Nurses (John Does 1-5)". Therefore, we hold that appellants were not ignorant of the identities of appellees in the sense contemplated by Rule 9(h). Consequently, no relief is provided appellants from the running of the statutory period by Rule 9(h).

Womble, 618 So.2d at 1267 (emphasis added).

¶12. The plaintiff asserts that ***Womble,*** when read in conjunction with the actual language of Rule 9(h), does not require the plaintiff to exercise due diligence in fact, but rather examines whether the plaintiff could have discovered the identity of the unknown defendant if due diligence had been exercised. We do not agree. ***Womble*** clearly applies a requirement that the plaintiff exercise a "reasonably diligent inquiry." It is clear that the plaintiff and her deceased slept on their rights for more than seven years after learning of decedent's illness. They first made a telephonic inquiry as to the source of the contaminated blood on December 27, 1993, only five days prior to the running of the statute of limitations.

¶13. The relation back privilege provided for fictitious parties under Rule 15(c)(2) requires the plaintiff to actually exercise a reasonably diligent inquiry into the

identity of the fictitious party. The trial court's review of whether the plaintiff exercised a reasonably diligent inquiry is to be strict. Upon review of the trial court's findings, this court will give great deference to the lower court finding that the plaintiff did not exercise reasonable diligence. Mississippi already enjoys one of the nation's longest general statute of limitations. This need not be judicially expanded to allow non-diligent plaintiffs the opportunities to sleep on their rights indefinitely.

¶14. The purpose of Rule 9(h) is to provide a mechanism to bring in responsible parties, known, but unidentified, who can only be ascertained through the use of judicial mechanisms such as discovery. It is not designed to allow tardy plaintiffs to sleep on their rights for seven years, make only one telephone call prior to the running of the statute, and then enjoy the benefits of the rule.

CONCLUSION

¶15. Even though the appellant attempts to characterize the July 8, 1994 order as a substitution of Mississippi Blood Services, Inc. for one of the John Doe defendants, the plaintiff actually substituted Mississippi Blood Services, Inc. for United Blood Services, one of the named defendants. Most important, in the amended complaint, all fifty original John Does are still named. If the plaintiff had properly substituted Mississippi Blood Services, Inc. for one of the John Does, there should be only forty-nine left.

¶16. However, even if this were not the case, the appellant would not be saved by the relation back doctrine found in Rule 9(h). We strictly construe Rule 9(h)

and adhere to the Womble requirement that the plaintiff actually exercise a reasonably diligent inquiry into the actual identity of the fictitious parties. ***Womble v. Singing River Hosp.,*** 618 So. 2d 1252, 1267 (Miss. 1993). This "due diligence" must occur prior to the running of the statute of limitations and must entail the actual exercise of "due diligence" rather than a mere finding that the party could have found the defendant's identity if it had exercised "due diligence."

¶17. We find that the trial court properly found that the plaintiff failed to exercise due diligence. After reviewing all of the evidentiary matters in the light most favorable to the plaintiff, it is clear that the plaintiff did not act diligently to discern the identity of Mississippi Blood Services, Inc. We therefore affirm the lower court's granting of summary judgment.

¶18. **AFFIRMED.**

PRATHER and SULLIVAN, P.JJ., PITTMAN, ROBERTS AND SMITH JJ., CONCUR. LEE, C.J., CONCURS IN RESULT ONLY. BANKS, J., CONCURS WITH SEPARATE WRITTEN OPINION. McRAE, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

BANKS, JUSTICE, CONCURRING:

¶19. I concur in the result reached by the majority. In my view the deferential standard of review that we give the findings of the trial court with respect to the question whether plaintiff exercised due diligence in ascertaining the names of the blood provider compels this result. There are elements in the majority opinion, however, which I am not prepared to accept.

¶20. First, I do not agree that it is significant that the amended complaint specified fifty as opposed to forty-nine John Doe defendants. That is, I would not defeat plaintiff's amendment because she failed to delete one of the John Doe defendants. To the extent that the majority opinion lends itself to that construction then, I disagree. Additionally, the suggestion that the trial court's review of the question of diligence is to be "strict" is not one that I am ready to accept. In my view such a review should be no different than any other factual issue to be determined by the court.

McRAE, JUSTICE DISSENTING:

¶21. The majority's construction of M.R.C.P. 9(h) and 15(c)(2) as preventing Doe from substituting Mississippi Blood Services for a fictitious party after the statute of limitations had run on her wrongful death action is flawed. Accordingly, I dissent.

¶22. The statute of limitations was tolled by the filing of the complaint on December 30, 1993. In February, 1994, United Blood Services, one of the original named parties, sought to be dismissed from the case because it did not supply blood to Forrest General Hospital during the time period at issue. In July, 1994, T. Doe moved to dismiss United Blood Services and join Mississippi Blood Services. Merely because all potential sources of the contaminated blood were not discovered prior to filing the suit or during the course of D. Doe's illness does not establish that T. Doe slept on her rights or failed to exercise reasonable diligence as required by ***Womble v. Singing River Hospital,*** 618 So. 2d 1252 (Miss. 1993).

¶23. Whether T. Doe followed the technicalities of substituting Mississippi Blood Services is a matter of semantics. The strict construction of the Mississippi Rules of Civil Procedure urged by the majority serves only to inequitably limit the extent to which real parties may be substituted for fictitious parties during the course of discovery. Accordingly, I dissent.

[Date of entry October 2, 1997]

SUPREME COURT AND COURT OF APPEALS

STATE OF MISSISSIPPI

CHARLOTTE B. WILLIAMS, CLERK
THIRD FLOOR GARTIN BUILDING
450 HIGH STREET
POST OFFICE BOX 249
JACKSON, MISSISSIPPI 39205-0249
TELEPHONE: (601) 359-3694
FACSIMILE: (601) 359-2407

Kathy Gillis
Chief Deputy

Bettye Malanchak
Deputy Clerk

December 18, 1997

T. Roe Frazer, II
LANGSTON FRAZER SWEET & FREESE
P. O. Box 23307
Jackson MS 392253307

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 18th Day of December, 1997.

Supreme Court Case #94-CA-1262
Trial Court Case #9377302

T. Doe, Individually, and In Her Capacity As One of the Wrongful Death Beneficiaries of D. Doe
vs.
Mississippi Blood Services, Inc.

Motion for Rehearing denied. McRae, J., would grant.

Supreme Court Clerk

tgb

ccs: John P. Sneed
Hinds County Circuit Clerk

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

T. DOE, Individually and in Her Capacity as One of the Wrongful Death Beneficiaries of D. DOE — PLAINTIFFS

V. — CIVIL ACTION NO. 3:94CV58WS

UNITED BLOOD SERVICES OF MISSISSIPPI, AMERICAN ASSOCIATION OF BLOOD BANKS, and JOHN DOES 1-50 — DEFENDANTS

ORDER

(Filed Jul. 11, 1994)

This day there came on for hearing the *ore tenus* motion of the Plaintiff to voluntarily dismiss without prejudice the defendant United Blood Services of Mississippi, Inc., and the *ore tenus* motion of the Plaintiff to join Mississippi Blood Services as a defendant. Being fully advised in the premises and noting that Defendants United Blood and American Association of Blood Banks, Inc., do not object, the Court finds that the motions are well taken and should be granted.

IT IS THEREFORE/AND FIRSTLY ORDERED that United Blood Services of Mississippi, Inc., shall be and hereby is dismissed without prejudice.

IT IS SECONDARILY ORDERED that the Plaintiff shall be and hereby is granted leave to amend the Complaint and join Mississippi Blood Services as a defendant.

SO ORDERED, this the 8 day of July, 1994.

/s/ James C. Sumner
UNITED STATES
MAGISTRATE JUDGE

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

T. DOE, INDIVIDUALLY AND IN HER CAPACITY AS ONE OF THE WRONGFUL DEATH BENEFICIARIES OF D. DOE — **PLAINTIFF**

VS. — **NO. 93-77-302**

MISSISSIPPI BLOOD SERVICES, INC. — **DEFENDANT**

ORDER

Defendant, Mississippi Blood Services, Inc., ("hereinafter referred to MBS") moves to dismiss or for summary judgment contending that the statute of limitations ran several months before it was sued. Thus, the time sequence of this suit is germaine.

In 1983 plaintiff decedent received a blood transfusion in connection with surgery at Forrest General Hospital in Hattiesburg, Mississippi. In 1987, she developed Acquired Immune Deficiency Syndrome ("AIDS") and died therefrom on January 1, 1991. Plaintiff filed a wrongful death suit on December 30, 1993, naming United Blood Services (hereinafter "United") as the supplier of the blood. The complaint also named John Does 1-50 as being involved.

The case was removed to Federal District Court and United filed a Motion to Dismiss on February 2, 1994, alleging that it did not supply blood to Forrest General Hospital until 1988 and did not supply the blood used in

the transfusion. MBS first received notice of the claim from United's attorney on March 24, 1994. The plaintiff's attorney had attempted on December 28, 1993, to obtain hospital records by mail but was unsuccessful and on February 8, 1994, subpoenaed Forrest General to obtain its records. In response to the subpoena the pathologists for Forrest General forwarded an affidavit on May 11, 1994, to plaintiff establishing that the blood was supplied by MBS. On July 8, 1994, plaintiff moved to dismiss United and moved to join MBS as a defendant. An Order was entered in Federal Court on that date. On July 21, 1994, plaintiff filed an amended complaint naming MBS as a defendant and on July 29, 1994, the Federal Court ordered remand to this Court.

MBS argues that Rule 15(c) Mississippi Rules of Civil Procedure require dismissal. Rule 15(c) states as follows:

> **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:
>
> (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and
>
> (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have brought against

> him. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

Plaintiff does not seriously contend that MBS received notice of the suit within the period of the statute of limitations and knew that but for a mistake the action would have been brought against it. Plaintiff primarily relies on Rule 9(h) which is as follows:

> **Fictitious Parties.** When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

Both plaintiff and defendant rely on *Womble v. Singing River Hospital*, 618 So. 2d 1252 (Miss. 1993). *Womble* controls in this case and it requires an examination and consideration of not only the above established uncontested facts but also consideration of the pleadings.

In the original complaint plaintiff without reservation alleged that United *collected*, packaged, manufactured, supplied, sold, warranted, and/or produced the blood or blood product that infected D. Doe with the HIV retrovirus." The complaint alleges that "John Does 1-50 are at present unknown and unidentifiable culpable persons and entities who were sellers, distributors, suppliers, marketers, packagers, testers, manufacturers, and/or warrantors of the blood or blood product that infected D. Doe with the HIV retrovirus."

In paragraph 7 of the complaint plaintiff specifically charged that the blood was *sold by United.*

Plaintiff obviously made some investigation to ascertain the name of the blood supplier and erroneously concluded that United was the collector, etc., of the blood. (Probably from the fact that United was the hospital's supplier at the time the suit was filed.) Upon ultimately discovering their error, plaintiff dismissed United and added MBS by amended complaint substituting the name of MBS where the name United had appeared in the original complaint. Unlike the facts in *Womble*, plaintiff did not have MBS listed as being a substitute for a John Doe defendant.

No consideration of the pleadings indicate that MBS was identified as a John Doe defendant. Moreover, plaintiff was not reasonably diligent in obtaining the collector, etc., of the blood.

Defendant does not attempt to argue that the statute of limitation began to run until the death of plaintiff decedent on January 1, 1991. However, any negligent act was finalized in 1983, and discoverable from the time of the diagnosis in 1987. A minimum of effort from that time or from January 1, 1991, would have revealed from the hospital's record that the initial supplier of the blood was MBS.

At least by December 28, 1993, plaintiff began inquiry to obtain the hospital's records but by mail and not by personal appearance. Plaintiff became aware on February 7, 1994, that it possibly had the wrong defendant. On May 17, 1994, plaintiff was aware that it was mistaken

and still made no move to correct the error until July 8, 1994.

MBS first learned of its possible involvement in the claim on March 24, 1994. Clearly, plaintiff cannot rely on either Rule 9(h) or Rule 15(c), having made no diligent effort to ascertain the name of the supplier of the blood.

The Motion to Dismiss and for Summary Judgment is hereby **GRANTED**.

SO ORDERED this the 2nd day of December, 1994.

/s/ William F. Coleman
WILLIAM F. COLEMAN
CIRCUIT JUDGE